87 - 1378.

No.

In the Supreme Court of the United States

DARRALYN BOWERS and CHARLES BECKHAM,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent,

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER A FEDERAL DISTRICT JUDGE WHO HAS, THROUGH HIS SUPERVISION OF PENDING LITIGATION, IN EFFECT BEEN SERVING AS THE "RECEIVER" OF A MUNICIPAL DEPARTMENT, AND HAS BECOME INTIMATELY INVOLVED, THROUGH THAT SUPERVISION, IN THE DEPARTMENT'S AFFAIRS, CAN SERVE AS THE NEUTRAL AND DETACHED MAGISTRATE REQUIRED BY THE FOURTH AMENDMENT WHEN WIRE TAP APPLICATIONS SEEKING TO INVESTIGATE ALLEGATIONS OF CORRUPTION WITHIN THAT DEPARTMENT ARE PRESENTED TO HIM?

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OPINION BELOW

The opinion of the Sixth Circuit Court of Appeals of September 17, 1987 is appended hereto as Appendix A.

The Order of the Sixth Circuit Court of Appeals of December 1, 1987 denying rehearing *en banc* is appended hereto as Appendix B.

STATEMENT OF JURISDICTION

On September 17, 1987, a panel of the Sixth Circuit Court of Appeals issued its opinion affirming Petitioners' convictions, and upholding the propriety of the electronic surveillance orders challenged herein. On September 29, 1987, Petitioners timely filed a petition for Rehearing with suggestion of rehearing *en banc*, and that Petition for Rehearing was denied by the Sixth Circuit Court of Appeals on December 1, 1987. This Court's jurisdiction to review the decision of the Court of Appeals by Writ of Certiorari is invoked under 28 USC §11254(1).

PROVISION OF LAW INVOLVED

Fourth Amendment, United States Constitution

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

NOTE REGARDING PARTIES BELOW

The other defendants in the criminal case, Eastern District Docket No. 83-60070 were Michael Ferrantino, Sam Cusenza, Joseph Valentini and Charles Carson, but their cases were disposed of in the District Court. Vista Disposal Inc. was not a party to the criminal case, but was the subject of an Order in a related civil case which was appealed to the Sixth Circuit Court of Appeals, under Docket No. 84-1250. Vista Disposal Inc. does not join in this Petition.

STATEMENT OF THE CASE

On May 6, 1977, the United States filed a civil action against the City of Detroit, the Detroit Water and Sewage Department (hereinafter referred to as "DWSD") and the State of Michigan, in connection with the operation of the DWSD waste water treatment plant. That suit sought to restrain the defendants from violating the Federal Water Pollution Act. It was assigned to the Honorable John Feikens, a Judge of the Eastern District of Michigan.

By September, 1977, the parties had entered into a Consent Judgement which outlined a schedule for bringing the waste water treatment plant into compliance with appropriate effluent limitations and other matters. However, compliance did not come as easily as anticipated, and in October of 1978, the United States sought an Order to Show Cause why the defendants were not complying with the Consent Judgement.

After a series of hearings, Judge Feikens issued an Opinion and Order on March 21, 1979 in which he appointed Coleman A. Young, Mayor of the City of Detroit, "Administrator" of the waste water treatment plant. *United States v City of Detroit*, 472 F Supp 512 (ED Mich 1979). That Order was to have far reaching effects.

On its face, the Order of March 21, 1979 conferred extraordinary powers and duties upon the Mayor as "Administrator." In a provision the significance of which came to loom large in the context of these proceedings, the Order empowered the Mayor to do whatever was necessary to manage the waste water treatment plant, including the letting of contracts "without the necessity of any action on the part of the Common Council of the City of Detroit, when in the judgement of the Administrator the same might unavoidably delay or impede accomplishment by the City of Detroit with the provisions of the Consent Judgement."

At the same time, the March 21, 1979 Order signalled an important change in the nature of Judge Feikens' involvement with the DWSD and the waste water treatment plant, a relationship the nature of which is central to the issue presented in this appeal.

As Judge Feikens later recalled it in a newspaper interview, although the Mayor was denominated the "Administrator" of the plant, "actually he did very little personally, although he did come to

one or two meetings at the Treatment Plant." Judge Feikens, on the other hand, began to become intimately involved with the operation of the Plant. As he later described it:

> Judge Feikens: That's really what the receivership meant. Not so much that it was in the person of Coleman Young, but that there was a focus which focus could be brought to bear in getting these done. So, I insisted that what Mayor Young had to do was to appoint a special administrator, and he did.
>
> Interviewer: Joe Moore?
>
> Judge Feikens: Joe Moore. We held a number of meetings out at the plant so that with physical presence I could impress on the supervisory staff that we were interested. Most of the problems stemmed from the fact that the people there didn't think there was any interest in solving these problems....individuals who might otherwise have been motivated, didn't care as much. Suddenly, there was a big focus of attention. What we had to do was to build back some esprit. What we had to do was to make it important to these people that they do their jobs, and so a host of changes began to be made and that's the kind of thing that I wanted to be able to accomplish, that you could bypass regulations that said "if you're going to order ball-bearings that you had to send those out for a bid." What we had to do was get those ball-bearings in. (Detroit Free Press Interview, pages 5-6)

Indeed, whatever the four corners of the March 21, 1979 Order might have stated, it soon became clear that Judge Feikens considered that the practical effect of that order was to appoint *him*

receiver of the waste water treatment plant. Thus, for example, in a hearing held on February 16, 1983, concerning the propriety of petitioner Charles Beckham continuing to serve as the head of the DWSD after the criminal indictment involved in this case was returned, Judge Feikens explained his role as follows:

> I am involved as a Federal Judge in a receivership, which followed a hearing of some extended length, I determined was appropriate. I appointed Mayor Young as the Administrator under my receivership, and I think it completely inappropriate for a public official, such as Mr. Beckham to be involved in any decision-making aspect of the DWSD while under criminal indictment.

Similarly, in the course of related hearings regarding the propriety of Vista Disposal's continued relationship with the City, Judge Feikens amplified his view of his role following the entry of the March 21, 1979 Order:

> The Court: But you see, the City is no longer in charge of DWSD's operations. This Court is . The city does not have a voice except as approved here. No one has ever challenged the fact that five years ago this Court became the Receiver of DWSD. That has been a fact of life under which we have done many things together. Contracts have been negotiated; rates have been negotiated; vast settlements on rate negotiations have been brought into effect; two Consent Judgements have been negotiated. A host of activities over these years under the Receivership have occurred.
>
> It is a misdirection, I think, to say both by you and by DWSD, that they have any power over the operations regarding sewage.
>
> Now, when I appointed the Mayor as administrator, I did so because I wanted to combine whatever political power he had as Mayor of the City of

> Detroit. He appoints, as you know, the Board of Water Commissioners, who run the department and they serve at his pleasure. I wanted to add whatever power he had as Mayor over the operations of the City of Detroit Water and Sewage Department, the extraordinary powers that I could confer upon him as the Receivership Court. But everything that the administrator does as administrator is subject to approval here. And the fact that DWSD might take the position — I don't know what its position really is in regard to
>
> Vista — but I will hear them on it if they would like to be heard — is subject to approval here.
>
> That's the nature of Receivership. I have been intimately involved in dealing for five years now in a vast number of problems affecting the operation of this treatment plant as Receiver.

Repeatedly, Judge Feikens referred in court proceedings to "my overall receivership of this plant," or "my receivership duty." However, whether or not the term of art "receiver" properly characterizes Judge Feikens' role as respects the DWSD and the waste water treatment plant, it is clear that, at least in his own mind, Judge Feikens came to feel, as he stated, "I am in charge of this plant."

What Judge Feikens himself characterized as his "intimate involvement" with the problems affecting the operation of the waste water treatment plant, extended to such matters as employee scheduling, meetings with representatives of regulatory agencies, *ex parte* meetings with various parties and their representatives, as well as staff members of DWSD, the negotiations of contracts and rates, and even to the mending of political fences — on January 9, 1980, Judge Feikens appeared before the Common Council of the City of Detroit, to answer criticisms and complaints of that body regarding

his and Mayor Young's stewardship over the DWSD and waste water treatment plant. There, he explained the necessity for the action, and his determination not to unnecessarily impinge on ordinary governmental processes, and agreed at one point to permit a representative of the Council to serve as liaison in connection with the various meetings and negotiations that he was conducting.

Of course, Judge Feikens did not operate the DWSD alone. In January, of 1980, Charles Beckham became director of the DWSD, appointed by Mayor Young. At the time of Mr. Beckham's appointment, the hauling of sludge from the waste water treatment plant was being handled under a contract between the City of Detroit and a company named Michigan Disposal Inc. Michigan Disposal was an established company owned by Michael Ferrantino. It owned a sanitary landfill in Western Wayne County which was one of the few places in southeastern Michigan cleared by regulatory agencies to accept sludge of the kind generated by the waste water treatment plant, and the only such landfill operating at that time on a seven day-a-week, 24 hour-a-day basis. The criminal case out of which this appeal arises concerns the efforts by Vista Disposal Inc. to become the City's second sludge hauler, and the dealings between Vista and those involved with it and City of Detroit, once the contract had been awarded.

Petitioner Darralyn C. Bowers has for years been involved in the real estate business in the City of Detroit. She has also been active politically and is a close friend and confidant of Mayor Coleman Young. In the spring and summer of 1980, she and a man named Jerry B. Owens set about forming a company to be known as Vista Disposal, with Owens as the nominal president and sole shareholder. Vista submitted a series of unsolicited proposals to the DWSD in an attempt to become the second sludge hauler.

Intimately connected with the formation of Vista was Michael Ferrantino and his associates, Sam Cusenza and Joe Valentini. Indeed, the cornerstone of the Vista proposal was a letter of intent from Ferrantino offering Vista the use of his landfill. Ultimately, on October 23, 1980, Vista was awarded the contract by Mayor Young, invoking his extraordinary powers as Administrator under Judge Feikens' Order, and bypassing the Common Council, which had refused to approve the contract when it was presented to them.

Jerry Owens was a native of the State of Mississippi, and had been involved in a number of businesses in that State. During the time Vista was getting under way, he was under indictment for State offenses in Mississippi and was being investigated by the Federal Bureau of Investigation for bribery and related offenses in connection with another of his Mississippi business enterprises. In August of 1980, he entered into an agreement with the United States Attorney's Office in Jackson, Mississippi which called for him to plead guilty to certain charges in that District, and to cooperate with the government. However, at the time of the award of the Vista contract, Owens had not yet plead guilty in Mississippi, nor had he informed the government about his involvement with Vista.

The Vista contract called for the company to construct a sludge processing facility at the waste water treatment plant. While construction was under way, sometime in November of 1980, Owens was approached by the FBI in Detroit, and at that time he began to cooperate with the government in an investigation of Vista Disposal and its contract with the DWSD.

Throughout the winter of 1980-1981, Owens surreptitiously recorded conversations with Darralyn Bowers and the others involved with Vista. He was also interviewed a number of times by the FBI, and told the agents, among other things, that he was merely "fronting" for Darralyn Bowers in Vista, and that, once the Vista contract was in place, Mrs. Bowers, Mike Ferrantino, Sam Cusenza and Joe Valentini had all agreed to pay Charles Beckham $2,000.00 per month while he was overseeing Vista's performance of its contract.

On March 31, 1981, the government presented in the United States District Court for the Eastern District of Michigan the first of ten applications for orders authorizing the interception of wire and oral communications, and in two of the ten instances, the installation of videotaping equipment. At that time, (and to this day) the Eastern District of Michigan provided by local rule for a rotating system of duty as Presiding Judge. Each week a different District Judge (including, if they so elect, those Judges on Senior status), and it is to the Presiding Judge that miscellaneous matters such as Title III applications are, according to local rule 9(a) to be taken. During the week of March 31, 1981, the presiding judge for the Eastern District of Michigan was the late Thomas P. Thornton, then a Senior District Judge.

Although Judge Thornton was available to review the application, the government chose instead to present it to Chief Judge John Feikens because of his "involvement in the operation of the Detroit Water and Sewage Department." The government apparently asked Judge Feikens whether he wished to review the application himself, rather than having it taken to the Presiding Judge. He did agree to handle the application, and on that date issued an Order authorizing the interception of wire communications on the defendant-appellant Bowers' home and office phones for a period of 30 days. Judge Feikens later recalled the event as follows:

> [B]efore I entertained the first application for electronic surveillance in this case — and I had been a Receiver for several years prior to that time — I conducted a research investigation into this area. I also asked the Department of Justice to do this: I wanted to be satisfied that before I looked at the first application for electronic surveillance, that it was proper for me to do it, and I concluded, based largely on the Second Circuit Decision [*United States v Coven*, 662 F2d 162 (2nd Cir. 1981], that it was my duty to do it.
>
> Now, I did not seek out the wire tap application. The Government came to me and asked me whether or not these should be submitted to me or whether or not they should be submitted to another Judge who would be the miscellaneous judge the following week.
>
> It was at that point that I made the determination. I was influenced, in large part, in making the determination that I did, by the fact that the Government took the position that whether or not I approved the wire tap application, if some other judge did, and they found information to believe that criminal conduct might be occurring, the Department said that they would have to notify me as the Receiver Court of this conduct.

The targets of the first application were Darralyn Bowers, Michael Ferrantino, Sam Cusenza, Joseph Valentini and Charles Beckham. The basic predicate of the application was the alleged bribery of Charles Beckham, in his capacity as the Director of the DWSD. The affidavit in support of the application set forth the history of the EPA lawsuit still pending before Judge Feikens, the March 21, 1979 Order appointing Mayor Young Administrator, the

award of the Vista contract under the extraordinary powers conferred in that Order, Owens' allegations regarding the bribery of Beckham, and excerpts from certain of the conversations surrepticiously recorded by Owens up to that point. On April 3, 1981, Judge Feikens signed a second order based upon essentially the same showing, the new application necessitated by the fact that Mrs. Bowers had gotten a new home telephone number. On April 28, 1981, Judge Feikens authorized the surreptitious placing of a video recorder in the Vista office, but the equipment was not used on that date.

On May 9, 1981, the government presented a third application for the interception of wire communications. However, by this time, the list of named targets of the investigation had expanded to include Mayor Coleman A. Young, alleged in the affidavit in support of the application to now have been shown to have been involved in an alleged pattern of racketeering activity involving Hobbs Act extortion, bribery and mail fraud. On that date, Judge Feikens authorized the interception of wire communications on the defendant Bowers' office and home telephones for an additional 30 days. Subsequently, Judge Feikens signed similar orders on June 7, 1981, July 27, 1981 and August 26, 1981. Further, on June 2, 1981, Judge Feikens signed an order authorizing the installation of video recording equipment at the Vista office, which this time was in fact used, and on July 16, 1981 signed an order authorizing the planting of a bug in the Mayor's private residence. On that date, more than 6 hours of conversation were intercepted.

All in all, more than 6,000 hours of conversations were intercepted by the government in the course of the investigation, all authorized by orders signed by Judge Feikens, who of course, throughout this time, continued to function, as he described it, as "receiver" of the DWSD. On February 3, 1983, an indictment was returned against Darralyn Bowers, Charles Beckham, Michael Ferrantino, Sam Cusenza, Joseph Valentini and Charles Carson, an attorney who had been involved with both Vista Disposal and Wayne Disposal.

On April 30, 1983, a motion was filed on behalf of all defendants to suppress the fruits of the electronic surveillance and for an evidentiary hearing, alleging that Judge Feikens' involvement in the affairs of the DWSD was such that he could not and did not function as the neutral and detached magistrate required by the

Fourth Amendment to the United States Constitution and Title III when he signed the various electronic surveillance orders. Argument on the motion was had on August 17, 1983, but Judge Robert E. DeMascio, to whom the criminal indictment was assigned, did not grant the evidentiary hearing which the defendants sought. Rather, he invited them to submit whatever they wished by way of an offer of proof. In response to this invitation, several defendants filed such offers, consisting of transcript excerpts and proposed testimony from both expert and participant witnesses, as well as letters and other documentary material, and with this material before him, but without the benefit of any live testimony, Judge DeMascio ultimately, on November 29, 1983, denied the motion in a Memorandum Opinion.

Subsequently, after two trials were held in the criminal case, Judge Feikens consented to an interview with a reporter from the Detroit Free Press concerning his stewardship over the DWSD, the Vista case, and the like. That article was published in the Detroit Free Press on August 26, 1984, and contained comments which seemed to petitioners to be pertinent to the "neutral and detached magistrate issue." On August 29, 1984, petitioners Bowers and Beckham, were the only ones still left in the case at that time, filed a Motion to Augment the Record with respect to the "neutral and detached magistrate issue" by the filing of the newspaper account of the interview, as well as a transcript of the interview itself. That motion was heard on September 14, 1984. Judge DeMascio granted the Motion to Augment the Record, and indicated, that while his previous ruling was based upon all of the material submitted by way of offer of proof, which he stated he took "all as true," he also acknowledged reviewing the contents of the newspaper article, and said that "I still believe, as I believed then, that there is nothing there that indicates that the Magistrate who issued those warrants was not totally neutral and detached." Although no actual motion for rehearing was before him, Judge DeMascio volunteered that even based upon the most "controversial" portions of the interview, "I am not going to sit here and reverse myself." *(Ibid)* Subsequently a transcript of the tape recorded interview prepared by Judge Feikens himself was filed with the District Court, along with a copy of the transcribed tape recording.

On September 26, 1983, a jury trial began on the criminal indictment against defendants Bowers, Beckham, Ferrantino, Cusenza, Valentini and Carson. On December 9, 1983, Bowers,

Ferrantino and Cusenza were convicted of RICO conspiracy, but the jury was unable to agree on a verdict as to any other defendant or any other count. Accordingly, a mistrial was declared as to other defendants and the other counts.

Subsequent to the first trial, the defendant Ferrantino died, and the defendants Cusenza, Valentini and Carson entered negotiated pleas of guilty. Thus, the second jury trial of the criminal indictment, which began June 18, 1984, involved only the petitioners Bowers and Beckham. Ultimately, on August 14, 1984, both were convicted of all counts remaining against them.

Petitioners appealed as of right to the Sixth Circuit Court of Appeals, which on September 17, 1987, rejected their claims in a 17 page *per curiam* opinion affirming their convictions. They timely filed a Petition for Rehearing and suggestion of rehearing *en banc*, which the Sixth Circuit denied without opinion by Order of December 1, 1987.

REASONS FOR GRANTING THE WRIT

At the core of the warrant clause of the Fourth Amendment to the United States Constitution is the guarantee that warrants shall not issue except upon the authority of a neutral and detached magistrate. *Johnson v United* States 333 US 10, 13-14 (1948) And, of course, the statutory requirements of Title III incorporate this constitutional guarantee. *United States v United States District Court*, 407 US 297, 301-302 (1972) This requirement that the judicial officer authorizing a search or interception be in fact neutral and detached is of manifest importance because "Issuing an intercept order is not simply a ministerial act... ." *United States v Bernstein*, 509 F2d 996, 1000 (4th Cir. 1975)

Indeed, the constitutional guarantee of a neutral and detached magistrate is the bulwark of the Fourth Amendment. It was the existence of that guarantee that permitted this Court, in *United States v Leon*, 468 US 897, (1984) to carve out a "good faith" exception to the exclusionary rule. Such an exception is possible only because of the assumption that, when they take their applications to search to a judicial micer the neutrality and detachment of the magistrate stands between their desire to search and the citizen's right to privacy. In *Leon*, the Court explained the role of judicial officers in the warrant process as follows:

> Judges and magistrates are not adjuncts to law enforcement team; as neutral judicial officers, they have no stake in the out come of particular criminal prosecutions.

It is noteworthy, as well, that the "good faith" exception does not apply where the magistrate is not in fact neutral and detached. *468 US Supra at 924*

The opinion of the Sixth Circuit Court of Appeal gives insufficient compass to the neutral and detached magistrate guarantee. By compartmentalizing this Court's rulings on the subject, and trivializing their scope, as well as the significance of Petitioners' arguments, the Opinion below bespeaks a significantly flawed understanding of this core principal of Fourth Amendment jurisprudence, and illustrates the need for further development by this Court of the law relating to that principal. Most alarmingly, the Opinion of the Sixth Circuit Court of Appeals in effect engrafts a "harmless error" standard upon the neutral and detached magistrate guarantee, which has never been suggested by this Court, and which is starkly in conflict with the Court's previous decisions in the area, particularly (and expressly) by *Coolidge v New Hampshire*, 403 US 443, 450-451 (1971).

Obviously, a magistrate has an impermissible "stake" in the outcome of a particular proceeding where he has a personal pecuniary interest which may be affected by his decision to either authorize or not authorize a search. *Connolly v Georgia*, 429 US 245, 250 (1977) And, of course, a magistrate cannot be held to be "neutral and detached" when he is himself an enforcement agent, or "actively in charge of the investigation which the proposed search is sought to aid." *Coolidge v New Hampshire*, 403 US *Supra* at 450, But it is not only such blatant inconsistencies between the magistrate's personal interest and the judicial role which he must fulfill which offend the Fourth Amendment's guarantee of a neutral and detached magistrate. Rather, the guarantee of impartiality which is embraced within it is so basic to our system of criminal justice that more subtle conflicts must also be understood to offend it.

Thus, in an analogous situation to that posed by the challenge to a magistrate's neutrality and detachment, this Court held that a municipal court system in which the mayor of a village heard trials

of petty offenses unconstitutional because any fines levied as a result of a conviction went to the city treasury, and the mayor's interest in and responsibility for the village finances was such as would offer a "possible temptation" to the average man as a judge "not to hold the balance nice, clear and true between the State and the accused..." *Ward v Monroeville*, 409 US 57, 60 (1972), quoting *Tumey v Ohio*, 273 US 510, 532 (1927) As the Court explained:

> Plainly that "possible temptation" may also exist when the mayor's executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court. This too, is a "situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, [and] necessarily involves a lack of due process of law in the trial of defendants charged with crimes before him." *Ibid*, quoting *Tumey v Ohio*, 273 US *supra* at 534.

One distinction which is fundamental to any inquiry as to whether a search has been authorized by a neutral and detached magistrate is that between partisan and judicial roles. If a judge is a partisan, he simply cannot be said to sit as a neutral and detached magistrate.

It is important to note that while a number of cases base the determination as to neutrality and detachment on whether the magistrate *in fact* manifested a partisan role in the proceedings, *see e.g., Lo-Ji Sales Inc. v New York*, 442 US 319, 326-327 (1979) (magistrate who accompanied police on a search "allowed himself to become a member, if not the leader, of the search party which was essentially a police operation.") It is sufficient to offend the constitutional guarantee if the role of the magistrate is inconsistent with neutrality and detachment, whether or not the magistrate acted impartially in fact and, whether or not another magistrate, truly impartial, might still have authorized the search. *Coolidge v New Hampshire*, 403 US *supra* at 450.

The Sixth Circuit drew a distinction between cases such as *Tumey v Ohio, supra, Ward v Monroeville, supra* and *Connally v Georgia, supra*, as exemplifying situations involving the "personal interest" of the magistrate and cases such as *Johnson v United*

States, supra, Coolidge v New Hampshire, supra, and *Lo-Ji Sales Inc. v New York, supra,* which, the court suggested involved magistrates who were improperly "linked" to the prosecution. (Slip opinion, pp. 10-12) Because Judge Feikens "had no personal financial interest" in the DWSD and "was not trying to raise money for his court or for the receivership: his conduct was not violative of what it perceived as the first line of cases, and because he had no perceptible "links to the prosecution," and, in the view of the Six Circuit "did what any neutral and detached judicial officer would have done if presented with evidence of the type before him," his conduct, the court held, did not run afoul of the prescriptions of what it viewed as the second line of authority.

Of course, this Court's decisions analyzing the neutral and detached magistrate guarantee do not breakdown along the lines suggested by the Panel Opinion, and their reach cannot be properly limited, as the Court of Appeals tried to do, through the device of compartmentalization. In short, the Court of Appeals' attempt to "divide and conquer" this Court's reading of the constitutional guarantee is a bankrupt enterprise, disingenuous at best.

Moreover, even after improperly fragmenting controlling authority, the Panel Opinion misinterprets the fragments.

While it is true that the record showed no "financial" interest on Judge Feikens' part, the logic of the constitutional guarantee and the rule enunciated in cases such a *Tumey v Ohio, supra,* do not limit the question of a magistrate's " "partisanship" simply to financial consideration.

Additionally, while the record surely did not show Judge Feikens to have been as inexplicably linked with the prosecution function as was the magistrate in *Lo-Ji Sales Inc. v New York, supra,* or the Assistant Attorney General in *Coolidge,* the record did show Judge Feikens to have had an investigative mindset, and to have adopted a personal attitude which favored the end of advancing the investigation. (See discussion *infra* at pp 28 through 32). Most alarmingly, the Panel Opinion's suggestion in that its opinion that the Title III application and affidavit established probable cause is entitled to any weight whatsoever is inconsistent with the nature of the neutral and detached magistrate guarantee and this Court's prior reading of it, and represents a wholly untoward attempt to engraft something like a "harmless error" standard onto that guarantee—an

attempt which was specifically rejected by the majority in *Coolidge v New Hampshire, supra,* which rejected the trial court's finding that any magistrate would have issued the warrant in question as a basis for upholding the search. 403 US *supra* at 450-451.

This Court's analyses of the neutral and detached magistrate guarantee have been, relatively speaking, few. Because of the nature of this Court's review function, it has responded to factually unique situations, and has not attempted to synthesize an ordered rule of construction of the neutral and detached magistrate guarantee. The somewhat anecdotal nature of this Court's previous decisions in this area may, to some extent, encourage the Court of Appeals' narrow minded and tightfisted application of the guarantee. However, the ruling below is clearly inconsistent with established Supreme Court precedent, and the fact that the Court of Appeals handed down such a ruling suggests that the case at bar would be an appropriate vehicle for this Court to grant Certiorari and issue an opinion that would synthesize and explain its previous rulings in this critical area of Fourth Amendment jurisprudence.

It is the position of the petitioners that, without more, it offended the Fourth Amendment guarantee of a neutral and detached magistrate for a person in the position of Judge Feikens to pass upon the Title III applications, given his relationship to the DWSD and the subject matter of the investigation, and whether or not his subjective mental state was that of neutrality and detachment. Beyond that, however, the record makes clear that *in fact* Judge Feikens was neither neutral nor detached in regard to the subject matter of the investigation and the electronic surveillance.

Judge Feikens as "Receiver"

Much of the argument in the trial court regarding Judge Feikens' capacity to sit as a neutral and detached magistrate focused on whether or not he had by the time of the Title III applications constituted himself a "receiver" of the DWSD and/or the waste water treatment plant, and on such questions as would naturally follow: whether his role as receiver was a "judicial" or "non-judicial" one, whether information acquired in this role was obtained "judicially" or "extrajudicially", and things of this nature. While labels such as these are somewhat unhelpful, it is clear from the record below that it was Judge Feikens himself who repeatedly characterized himself as a "receiver" of the DWSD, and when as good a lawyer as Judge Feikens uses a legal term of art to characterize his own involvement

in a series of events, it is by no means unreasonable to explore the implications of the term which he uses.

Following are some illustrative examples from various proceedings in open court:

June 17, 1982: "I think it very definitely is a part of my overall receivership of this plant."

February 16, 1983: "I appointed Mayor Young as the Administrator under my receivership..."

February 28, 1983: "No one has ever challenged the fact that five years ago this Court became the Receiver of DWSD."

February 28, 1983: "I have been intimately involved in dealing for five years now in a vast number of problems affecting the operations of this treatment plant as Receiver."

February 28, 1983: "[B]efore I entertained the first application for electronic surveillance in this case — and I had been a Receiver for several years prior to that time — I conducted a research investigation into this area."

March 8, 1983: "Are you saying that I can't act as Receiver in this case?"

March 9, 1983: "...I perceive it to be a part of my Receivership duty, the public health of the community being involved in this, that there be no interruption in the carrying away of the sludge;"

While a receiver is often referred to as an "arm" of the court, the function of a receiver seems clearly to be a non-judicial one. The essence of the duty of a receiver seems clearly to be a non-judicial one. The essence of the duty of a receiver is to function as a custodian of the property in receivership. 65 Am Jur 2d, *Receivers*, §135, page 965. His principal duty is to protect the assets of the receivership property, 66 Am Jur 2d, *Receivers*, §201, page 31, and while impartiality or "indifference" as between the parties to the

underlying lawsuit is a basic duty of a receiver, it appears that this duty is imposed because the receiver's principle obligation is to the property itself. A receiver is expected to take an active role with respect to the property, preserving it from waste and guarding it against depreciations. *Ibid.* Thus, while a receiver's duties may be seen as custodial, he is not a mere custodian: indeed when a lawsuit is commenced regarding the assets of the receivership, the receiver has been held to be the real party in interest. *Stephenson v Golden*, 279 Mich 710, 762 (1937).

That Judge Feikens saw himself in such a role, and in such a relationship to the DWSD is highly significant. Not only does it suggest that he had come to feel a proprietary relationship with the DWSD — which was, after all, the immediate "victim" of the allegations of corruption which were the subject of the wire tap applications — but it also implies that, to some extent at least, Judge Feikens had slipped from a judge-like role in relation to the DWSD, into some other frame of mind.

It is the essence of judicial activity, to resolve disputes between parties, to make determinations of rights in the context of an adversarial system. Even when a judge sits in an *ex parte* proceeding such as an application for an electronic surveillance order, it is his function to weigh the sufficiency of the showing made by an advocate against constitutional and statutory requirements. The role of receiver, however, is qualitively different in character, and although the actions of a receiver may work to effect the operation of a judicial decision, those actions are separate and different from the actual judicial decision-making process.

It is argued below that, by the time the Title III applications were presented to Judge Feikens, his involvement with the DWSD had been such that he so identified himself with that department, the "victim" of the alleged crimes being investigated, that he could not be expected to and did not in fact possess the kind of neutrality and detachment which the constitution requires. Indeed, the fact that Judge Feikens repeatedly referred to himself as receiver of the DWSD — its conservator, guardian and protector — strongly supports such a conclusion. However, the point which is suggested here is somewhat different, and perhaps more subtle. Put as simply as possible, it is that Judge Feikens, having come to think of himself as the receiver of the DWSD, had assumed a role in relation to that department which was un-judgelike, and that it does not comport

with the constitutional requirement of a neutral and detached magistrate to have vital search and seizure issues decided by an individual who wears the robe of a judge but the hat (and heart?) of a receiver or conservator of the institution or property most directly affected by the search proposed.

Actually, the role which Judge Feikens assumed in relation to the DWSD in the context of the EPA lawsuit is one which is becoming more common in what has come to be known as "public interest litigation." In complex and lengthy matters such as that involving the DWSD, as in similar cases involving other public facilities, the lawsuit often does not end with the entry of a judgement or decree, and the implementation and monitoring of compliance with the typically complex judgements in such cases often have come to include the trial judge as a principal actor. As one commentator has put the matter:

> The characteristic features of the public law model are very different from those of the traditional model. The party structure is sprawling, amorphus, subject to change over the course of the litigation. The traditional adversary relationship is suffused and intermixed with negotiating and mediating processes at every point. The judge is the dominant figure in organizing the guiding the case, and he draws for support not only on the parties and their counsel but on a wide range of outsiders — masters, experts, and oversight personnel. Most important, the trial judge has increasingly become the creator and manager of complex forms of ongoing relief, which have widespread effects on persons not before the court, and require the judges continuing involvement in administration and implementation. Chayes. *The Role of the Judge in Public Law Litigation*, 89 Harvard Law Review, 1281, 1284 (1976)

As the record makes abundantly clear, and as will be further explored below, Judge Feikens' involvement in the EPA litigation was most assuredly that of "creator and manager." As that record also makes clear, he personally involved himself over an extended period of time in negotiations and discussions with the parties, and gave personal oversight to many aspects of the operation of the

DWSD, both in and out of court. Indeed, Judge Feikens was perhaps (justifiably) proud of the "five years of vigorous activity by many parties in this case, and myself in the operation of this treatment plant."

While the "vigorous" involvement of the trial judge responsible for the oversight of important public interest litigation, such as was involved below is of course commendable, it also carries with it "obvious disadvantages, not least in its inroads on the judge's time and pretentions to disinterestedness." Chayes, *supra*, at 1300 Indeed, such non-traditional activities have been characterized as "parasitic," in the sense that "they can be effectively carried out only by drawing on the legitimacy and moral force that courts have developed through the performance of their inherent function, adjudication according to the traditional conception." Chayes, *supra*, at 1304 To the extent that this argument has any force, it also implies that "the most non traditional activities of the judiciary are at odds with the conditions that insure the moral force of its decision." *Ibid.* Of course, the principal element of the "moral force" underlying judicial decision-making is the assurance of neutrality, detachment, impartiality and "disinterestedness."

All of this is of course not to say that Judge Feikens should have assumed a more passive role in the civil litigation which was before him. Indeed, without that kind of judicial involvement, the DWSD might never had been brought into compliance. However, the inconsistency between Judge Feikens' role with respect to the DWSD and the role which he was to assume when reviewing the Title III applications is clear — whether or not that former role fits the traditional model of a "receiver."

Judicial and Extrajudicial Knowledge and Action

The Court of Appeals held that Judge Feikens' involvement with the affairs of the DWSD, and the knowledge or opinions he gained therefrom, could not serve as a proper basis for his "disqualification" from reviewing the Title III applications since any such knowledge or actions "stemmed from the performance of Judge Feikens' judicial duties in the civil case," and because, in that court's view, most of the incidents referred to by Petitioners occurred after the initial Title III application. Once again, the Court of Appeals' reading of the record and the applicable law is parsimonious, and its reliance on the rubric of cases involving judicial disqualification, and

holding that disqualifying bias must be based upon "extrajudicial sources" rather than the participation in judicial proceedings, e.g. *Demjanjuk v Petrovsky*, 776 F2d 571, 577 (6th Cir. 1985) inappropriate to Petitioners' challenge to Judge Feikens neutrality and detachment — because the right to have applications for search warrants reviewed by a neutral and detached magistrate is not in any way coextensive with the rights recognized by the disqualification statutes and case law.

In the main, a federal judge serves as the arbiter of an adversary proceeding, in which the interests of contending parties are represented. In the main, such proceedings are, or are subject to being, recorded, so that the propriety of the judge's actions may be fully reviewed. *Ex parte* proceedings such as applications for temporary restraining orders, do of course exist, but they are by their own terms, "extraordinary," and are subject to a host of procedural guidelines and limitations.

The warrant-issuing process is, however, virtually *always ex parte*, and it is basic to the nature of these proceedings that they are secret from the persons on whom they will have the greatest impact. Although the Fourth Amendment requires that a warrant not be issued except upon an "oath or affirmation" which is subject to review, the magistrate's determination as to the issuance of a warrant is subject to "great deference," *Illinois v Gates*, 462 US 213, and the actual application proceedings itself is typically not recorded (Indeed, in the instant case, defendants asked as a part of their motion for an evidentiary hearing for discovery and/or a hearing regarding the colloquy between Judge Feikens and the government representatives who presented the Title III applications, but, because the trial court declined to hold an evidentiary hearing of any sort, no such information was ever furnished.

At the same time, a search, and more particularly a search conducted by means of electronic surveillance, represents an extreme intrusion on the privacy of a citizen — and the harm to the citizen if the search is improperly authorized is complete and irreparable at the time the search takes place, since the right to privacy which is involved is violated by the search itself, and not merely by the use of its fruits. *Berger v New York*, 388 US 41, 60 (1967) Thus, while judicial impartiality is certainly basic to the constitutional guarantee of due process, the requirement that search warrants be issued only by the action of a neutral and detached magistrate is a special case of

the general proposition, and the rubric of the disqualification cases is of only limited applicability.

Those cases do distinguish between "judicial" and "extrajudicial" knowledge or conduct, and, applying the term "judicial" with varying degrees of breadth, generally hold that knowledge acquired or acts performed in a "judicial" setting do not constitute a proper basis for statutory disqualification. Of course, it is not the law "that a judge's conduct of proceedings before him can *never* form a basis for finding bias." *United States v Wolfson*, 558 F2d 59, 63 (2nd Cir. 1977) (emphasis in original) And, particularly in the context of complex litigation such as that over which Judge Feikens presided, labels such as these and attempts to characterize conduct as "judicial" or "extrajudicial" is at the least unhelpful, and, worse, potentially misleading. Certainly not everything concerning the subject matter of a lawsuit is "judicial" activity, nor is every action outside the courtroom "extrajudicial." Rather petitioners suggest that what the Court should do is examine the acts and conduct of Judge Feikens, and ask itself whether, at the time of the Title III applications, his involvement in and knowledge of the operations of the DWSD had gone noticeably beyond the kind of role traditionally played by judicial officers in our legal system — since it is clearly with that role in mind that the framers of the Constitution drafted the Fourth Amendment.

That Judge Feikens' participation in the DWSD went far beyond what Professor Chayes describes as "non-traditional" is apparent from even the most cursory review of the record. For example, according to Joe G. Moore, who served as the Assistant Administrator of Waste Water Operations since 1979, and was described by Judge Feikens as "one of the persons who contributed the most" to solving the problems of the waste water treatment plant, Judge Feikens:

- consulted with Professor Moore on an ex parte basis "numerous" times;

- had "many" conversations with some but not all parties to the litigation in the absence of the others;

- insisted that Professor Moore reinstate a particular employee who had been let go because of "a dispute regarding residency";

- negotiated shift scheduling disputes with union representatives;

- arranged a tour, in the absence of some litigants, of salt mines as potential alternative disposal cities;

- secured financial data regarding collections for his private uses;

- visited the waste water treatment plant in the absence of the litigants in order to congratulate the plant personnel on their performance;

- arranged, through the intervention of the Governor of the State of Michigan for the Governor of the State of Texas to permit Professor Moore to be relieved from full time teaching duties at the University of Texas, so that he could continue to serve as Assistant Administrator;

- sometime in 1979 or 1980 inquired of Professor Moore if he "felt or knew of anything illegal was going on at the waste water treatment plant;"

- told Professor Moore privately that he had had him "checked out" and found him to be "clean."

Beyond this, of course, Judge Feikens, on January 9, 1980, appeared before the Common Council of the City of Detroit, to respond to certain complaints voiced by that body regarding the court's involvement in the operation of the waste water treatment plant and, as well, the appointment of Mayor Young as Administrator and the grant of extraordinary powers to him as a part of that appointment. In the course of that appearance, (not, as far as the record discloses, attended by any parties to the litigation) he agreed to "welcome" a representative of the Council to certain meetings to be held concerning rates and compliance and agreed to "take up" with Mayor Young a suggestion from the Council that it form a committee to oversee rate structures. Throughout, he reassured the Council that the process of settlement and negotiation was continuing under his direction, and that it was not his intention to continue "the receivership" of DWSD in perpetuity.Moreover,

from his own statements from the bench, it is clear that Judge Feikens viewed his own role as far more than that which is traditionally characterized as "judicial." Most evocative of all of his statements may well be his assertion to counsel for the City of Detroit on June 17, 1982 that "I am in charge of this plant." And, in a similar vein, he later stated;

> But you see, the City is no longer in charge of DWSD's operations. This court is. The City does not have a voice except as approved here.
>
> No one has ever challenged the fact that five years ago this Court became the Receiver of the DWSD. That has been a fact of life under which we have done many things together. Contracts have been negotiated; rates have been negotiated, vast settlements on rate negotiations have been brought into effect; two Consent Judgements have been negotiated; a host of activities over these years under the receivership have occurred.

It is true, of course, that the critical inquiry as to whether or not Judge Feikens could or did serve as neutral and detached magistrate must focus on the period from March to August, 1981, when the Title III applications were submitted to him. However, as this Court did in *Lo-Ji Sales Inc. v New York*, 442 US *supra* at 326-327, it is proper, in making such an inquiry, to examine the conduct, neither in the statement set forth next above, nor in any other utterance, did Judge Feikens ever distinguish between his role before 1981 and his role after. Rather, he referred to his "receivership" as being continuous and persisting for five years — since March of 1979. Indeed, he specifically stated that he has been "intimately involved in dealing for five years now in a vast number of problems affecting the operations of this treatment plant as Receiver."

Judge Feikens himself characterized his own involvement in the running of the DWSD as all-encompassing: "no operation affecting the treatment plant can really be made without the approval of the Court."

Whatever the actual effect of his involvement in the affairs of the DWSD may have been upon Judge Feikens' ability <u>in *fact*</u> to sit as a neutral and detached magistrate when the Title III applications were presented to him (a subject which will be taken up next), one fact

must be clear to anyone who would read the record with eyes open: Judge Feikens had in his involvement with the affairs of the DWSD, stepped far beyond the bounds of traditional judicial activity. His involvement with the management and administration of the DWSD was so profound, so long-standing, and he was so bound up with the operation, fate, and future of the DWSD and the waste water treatment plant that it is simply preposterous to believe that at the same time the constitutional guarantee of a neutral and detached magistrate would not be violated by permitting him to pass upon the Title III applications.

Petitioners are convinced that the record in this case demonstrates actual bias and a lack of neutrality and detachment on Judge Feikens' part. However, it is important to note that the constitutional guarantee of impartiality which is central to the requirement that search warrants be approved by a neutral and detached magistrate, is violated by situations which merely offer the potential for unfairness — and to demonstrate such a potential it is not necessary to establish that the judicial officer have a personal interest in the outcome of the proceeding. Thus, for example, in *Ward* v *Monroeville*, *supra*, the Court struck down the mayor's court system notwithstanding the fact that the mayor himself had no personal pecuniary interest to the outcome of the cases on which he sat, but rather only because his "executive responsibilities for village finances may make him partisan... ." 409 US *supra* at 60. It seems clear that Judge Feikens, who conceived of himself as being "in charge of this plant," had assumed "executive responsibilities" with respect to the plant of at least the same dimension as those of the Mayor which the Court held in *Ward* v *Monroeville*, were too likely to "make him partisan" to permit him to sit as judicial officer. And, of course, as the record also shows, by the time the Title III applications were submitted to him, Judge Feikens had indeed become a "partisan."

Judge Feikens as Partisan

When he appeared before the Detroit Common Council on January 9, 1980, Judge Feikens expressed his hopes for the resolution of the lawsuit which has been brought by the EPA as follows: "I think what our goal should be is to get that plant in compliance so that the receivership can be ended, so that the suit can be dismissed, so that the parties involved in this can assume their rightful place." (Minutes, January 9, 1980, page 3). Indeed, it is hardly extraordinary that a Judge should hope for compliance with the orders of his court — or, for that matter, that persons will obey

the law or that the laws will be properly enforced. However, the task of achieving that compliance with respect to the EPA litigation over which Judge Feikens presided was an extraordinarily complex and difficult one, and the extraordinary lengths to which Judge Feikens felt moved to go to see that task accomplished, involved him so pervasively in the affairs of that department that one can only conclude that he came to identify so wholly with the department, that he lost the actual objectivity required of a neutral and detached magistrate.

Judge Feikens himself described his involvement as "intimate" and "vigorous." As noted above, it was also pervasive. Is it any wonder that the man who saw himself as "in charge of this plant" would also come to feel a responsibility for its well-being?

It will be recalled that the affidavit of Joe G. Moore - accepted as true by the trial judge when refused the defendants an evidentiary hearing on the issue of neutrality and detachment — established that "sometime in 1979 or 1980 Judge Feikens called me personally and asked me if I felt or knew of anything illegal going on at the waste water treatment plant." This investigation effort by Judge Feikens was undertaken, it will be noted, well before the Title III applications were presented to him. The fact that Judge Feikens made such an inquiry suggests either some pre-existing suspicion that something was afoot or, at least, that he had some pre-existing desire to see an investigation conducted. Either of these inferences strongly undercut his actual ability to sit as neutral and detached magistrate when the government proposed to go forward with such an investigation.

While Judge Feikens' original role in the EPA litigation may have been strictly judicial, it is clear that once he began to view himself as the "receiver" — at the time of the entry of the March 21, 1979 order — he became a full fledged participant in the affairs of the DWSD, trying to solve the problems of that agency in seeking to achieve compliance with the terms of the Consent Judgement. Indeed, Judge Feikens himself recognized that that metamorphosis had taken place. As he stated at one point: "Maybe I am getting into such a habit in that sewage case — maybe I am so strongly directed now to problem-solving rather than just dispute-resolving, that I see everything in that kind of focus... ." Equally clear is the fact that Judge Feikens had not only a tremendous personal desire to see those problems solved, but a strong sense of pride in which he was involved to solve them. For example, as he stated in his interview with the Detroit Free Press:

> "There were a group of about ten lawyers and they and I sat around this table countless number of times and solved the problems that helped people like Beckham, Moore on a host of problems. We had people that could address problems when they came up. We knew how to get them licked.
>
> . . .
>
> . . .the stories that a large city was able to take a problem and correct it, and they've done that. That to me is the story.

Interviewer: You seem very proud of your court ordered accomplishment.

Judge Feikens: Well, just one person involved in it...yes, I am.

The record is replete with evidence that Judge Feikens came to identify himself in a very real sense not only with the progress of the EPA lawsuit but with the DWSD itself. Indeed, in his Common Council appearance on January 9, 1980, he repeatedly uses collective references such as "we" and "our" to describe his involvement with DWSD. This kind of linguistic clue to the nature of Judge Feikens' statements on the record. Indeed, petitioners offered in the court below the testimony of Dr. Roger Shuy, a professor of linguistics at Georgetown University, who performed an analysis of the transcribed hearings in the EPA lawsuit, and concluded that "Judge Feikens considers himself and the DWSD one and the same." (This offer of proof was accepted as true by the trial judge when he declined to hold an evidentiary hearing as requested.)

However, recourse to expert testimony may not even be necessary to establish that Judge Feikens came to identify himself with the DWSD, since Judge Feikens recognized that this had occurred:

> We are, by we I am now identifying myself with DWSD, which I have had a tendency to do, having been associated with them for five years... .

There is no question but that the immediate victim of the alleged bribery and fraud which was the predicate for the Title III applications was the DWSD — the department with which Judge Feikens had come to identify so closely, with which he had such a long standing "intimate" involvement, over which he been offended? How could he not approach the Title III applications with a private interest in "getting to the bottom" of the allegations of corruption in the DWSD? How could his identification with the "victim" not have interfered with both his neutrality and his detachment? Given his involvement as "problem solver," and his identification with the DWSD and its personnel, how could he possibly have remained unbiased?

The decision which Judge Feikens had to make as Magistrate was whether or not the investigation would go forward, not what its results might be, and as stew ard of the affairs of DWSD, he clearly had an interest in "getting to the bottom of" the allegations — an interest which interestingly, he had already manifested in 1979 or 1980 by his inquiry of Professor Joe G. Moore as to whether *he* had any knowledge of illegalities. Such a predisposition to investigate (i.e., search) is *precisely* the kind of predisposition which is a neutral and detached magistrate must not have, and precisely the sort of predisposition which such cases as *Connelly v Georgia, supra* warn against. (There, a system which paid the magistrate the sum of $5.00 for each warrant which was issued and nothing when the warrant was declined was found to offer an impermissible "temptation to the average man as a judge..." 429 US *supra* at 250). And of course, Judge Feikens had clearly manifested this predisposition well before the first Title III application was presented to him.

Actual Bias and Prejudice

Beyond that evidence which suggests that Judge Feikens' involvement with the DWSD had made it impossible for him to sit as a neutral and detached magistrate regarding the allegations of corruption of that department contained in the Title III applications, there is additional, particularly troubling evidence in the record that suggests that he also decline to consider the Title III applications.

As noted above, after both criminal trials were completed, Judge Feikens consented to an interview by a reporter for the Detroit Free Press which was published on August 26, 1984. Certain statements made by Judge Feikens were the subject of considerable public

discussion and prompted outcries of "racism" even from members of Judge Feikens' own bench, and which were the subject of two complaints of judicial misconduct to the judicial council of the Sixth Circuit. The statements which raised the greater furor were the following:

> One of the things that we have to give black people the time to learn to do is to learn how to run the city governments, to run projects like the Water and Sewage Department. Unfortunately, they're still at an era of development, many of them,in which they think all you have to do is talk about this thing. So you hear a lot of rhetoric. Talking is important; words are important. But you have to do more than talk about it. . .

> . . .So, and I think that as the black people come into political power in all the big cities of the United States, they have to learn how to climb hills. Some will. Some will not understand how to run governments. Some will not understand leadership. (Detroit Free Press Interview, pages 17-18).

Certainly, the patronizing tone of these statements suggests a kind of racism that is troubling, and is particularly suggestive of a state of mind which might well move the speaker to give less than even-handed treatment to black persons suspected of criminally or be more ready to assume misconduct on their part — and, of course, the petitioners are both black. It is also troubling, of course, that these statements echo Judge Feikens' statement to Professor Moore that "you know these people have to be led." However, there are other statements made by Judge Feikens in the course of the interview from which one can only conclude that, beyond apparently lapsing into an outmoded kind of paternalism that we now recognize as racist, he also harbored specific feelings about the petitioners which are simply inconsistent with the role of a neutral and detached magistrate. As to petitioner Bowers, Judge Feikens remarked to the *Free Press* interviewer:

> I think the irony in this Vista case was that he [Mayor Young] could have used his powers to have gotten a lot of people who wanted to help into this operation, rather than to choose a person like Darralyn Bowers. In a prior

> experience with her, she went out in Rosedale Park and tried block-busting, and there was a case in this court years before Vista in which Judge Keith presided. Darralyn Bowers was very much interested at the thought that blacks were moving in, and he put an end to that. She was not. . .
>
> Interviewer: How did he do that?
>
> Judge Feikens: Well, at a court hearing he ordered that practice of block-busting stopped. Now that wasn't the kind of a black person that I thought ought to be helped.

In these remarks, Judge Feikens plainly states that he had "prior" knowledge of Mrs. Bowers, from what he understood to be her involvement "years before" in the past tense that he felt that Mrs. Bowers "wasn't the kind of black person that I thought ought to be helped," he is clearly attributing that state of mind regarding her to knowledge which he had of her well before any Title III applications were presented to him — a state of mind which is clearly inconsistent with impartiality, neutrality or detachment. Rather, his pre-existing belief that Mrs. Bowers had been involved in illegal practices which another judge had had to "put an end to" could only have served to predispose him to believe the allegations of corruption and illegality which were the predicate for the government's request that he authorized the tapping of her telephones.

Judge Feikens attributes his opinion of Mrs. Bowers to his understanding of her involvement in events which led to a lawsuit before Judge Damon Keith, now of the Sixth Circuit Court of Appeals, and formerly a District Judge in the Eastern District of Michigan. Although strictly speaking, it may not be reflected in the record on appeal herein, the fact is that Mrs. Bowers was not a party to the "block-busting" case. However, whether Judge Feikens' recollection of the facts of that case is accurate or inaccurate is really of no comment. Even adopting the rubric of the disqualification cases, Judge Feikens' knowledge of the facts of that cannot by any stretch of the imagination be deemed "judicially acquired," since he was not the judge who presided over those proceedings. His understanding of the facts of that case is simply that of a citizen, and while every citizen has the right to acquire knowledge of public affairs and court proceedings, when a judge, upon the basis of such

citizen's knowledge, and not based upon his own judicial activities, forms strongly negative opinions about persons whose vital interests will be affected by his decisions, he is simply disqualified from sitting as a judge in proceedings involving them. At the very least, 28 USC §455(a), a provision which the Sixth Circuit itself has held as "self-executing," and which provides for recusal in any proceeding where the judge's "impartiality might reasonably be questioned," requires this, and the Fourth Amendment can hardly require less. *Roberts v Bailar*, 625 F2d 125, 128 (6th Cir. 1980).

As to the Petitioner Beckham, Professor Moore's affidavit indicated that "probably in the summer of 1981", when Professor Moore suggested that the position of Director and Assistant Administrator of the DWSD be combined, Judge Feikens reacted angrily by stating "not that fellow Beckham," a cryptic remark which he immediately explained by expressing the belief, noted above, that "you know these people have to be led."

The Court of Appeals' treatment of this very real evidence of Judge Feikens' personal animus toward Petitioners is disturbingly cavalier, particularly in light of the values which the neutral and detached magistrate guarantee serves. As to the Petitioner Bowers, the Court of Appeals wholly ignored the fact that Judge Feikens' own words indicated that his attitude towards her was based upon events which well antedated his involvement with the DWSD, and held that "given the amount of water that had gone over the damn," the evidence of the statements did not move the court or suggest that Judge Feikens decision to authorize the wire taps was based upon anything other than the probable cause showing of the applications — again suggesting a "harmless error" standard which is not only inconsistent with the case law, but evinces a callous disregard for the need to maintain the appearance of justice in judicial proceedings.

The Court of Appeals' handling of the evidence regarding the Petitioner Beckham is equally troubling. Dismissing the significance of the judge's 1981 statement that "[black] people have to be led", the panel suggests that it is understandable, as the judge by then "knew" Mr. Beckham "to be a crook". (Slip opinion p. 15) Regardless of the evidence at that time, a statement suggesting that a decision as to hiring or wiretapping may be made on the basis of race rather than individual ability or individual culpability is contrary to all law. moreover, by no stretch of the imagination did the judge "know" whether Mr. Beckham or anyone else was "a crook". He

had seen only *ex parte* affidavits relying primarily on the word of a convicted felon who had admittedly defrauded the government and which in any event, only circumstantially implicated Mr. Beckham and only if one believed the words of the informant and another person with a motive to lie. Mr. Beckham was at the time charged with no crime, and he was legally presumed innocent of all wrongdoing.

Perhaps the most troubling aspect of the Court of Appeals decision is the airy way in which the Panel made light of the racism which seems so clearly to color Judge Feikens thinking the Petitioners. These errors are perhaps the panel's most egregious, for they reflect an acceptance of racial bias that should be "unthinkable" in an American court. Cf. *Bolling v Sharpe*, 347 US 497, 500, 74 SCt 693, 98 LEd 884, 887 (1954). Whether benign or active, patronizing or spiteful, racial bias simply ought not be condoned in a court committed to equal justice under law. Views such as those expressed by the judge in the Detroit *Free Press* interview —"black people. . .have to learn how to climb hills. Some won't. Some will not understand how to run government. Some will not understand leadership. " — also do not develop overnight, and it flies in the face of human experience to suggest that such remarks made in 1984 do not also reflect a biased view of blacks in 1981. This conclusion is especially inescapable when, also in 1981, the judge stated of black people, "you know these people have to be led." Excusing such comments as merely "impolitic", ignores their true import and condones the brutal legacy of racial bias that has destroyed and stilted so many lives in this nation for too many generations.

Respectfully Submitted

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APPENDIX A

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

Nos. 84-1105/1193/1250/1736/1737

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DARRALYN BOWERS,
Defendant-Appellant
(84-1105/1193/1736),

DARRALYN BOWERS and VISTA DISPOSAL, INC.,
Intervenors-Appellants
(84-1250),

CHARLES BECKHAM,
Defendant-Appellant
(84-1737).

ON APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed September 17, 1987

Before: NELSON and RYAN, Circuit Judges, and BROWN, Senior Circuit Judge.

PER CURIAM. These cases come before us on appeals by Charles Beckham and Darralyn Bowers from criminal convictions for activities connected with the operation of the

Detroit sewage treatment system. Mr. Beckham was convicted on one substantive R.I.C.O. count, 18 U.S.C. § 1962(c); seven Hobbs Act extortion counts, 18 U.S.C. § 1951; and four mail fraud counts, 18 U.S.C. § 1341. He was sentenced to twelve three-year terms of imprisonment, to be served concurrently, and was ordered to forfeit $16,675.00 in illegal payoffs. Ms. Bowers was convicted of one substantive R.I.C.O. count, 18 U.S.C. § 1962(c); one R.I.C.O. conspiracy count, 18 U.S.C. § 1962(d); and four mail fraud counts, 18 U.S.C. § 1341. She was sentenced to four years' imprisonment on each of the R.I.C.O. counts and two years on each of the mail fraud counts, all sentences to run concurrently.

Some of the evidence incriminating defendants Beckham and Bowers came from electronic surveillance authorized by United States District Judge John Feikens. The defendants challenge their convictions on the ground that Judge Feikens was not, as they allege, a "neutral and detached" judicial officer. The defendants' allegations are based in part on Judge Feikens' judicial supervision of the Detroit Water and Sewerage Department under a federal court order, and in part on certain statements made by the judge in the course of an interview granted to a Detroit newspaper reporter. We are not persuaded that Judge Feikens was anything other than the "neutral and detached" judicial officer required by law, and we shall affirm the convictions of both defendants.

* * *

During the 1970's the United States Environmental Protection Agency filed a civil action challenging the efficacy of the Detroit Water and Sewerage Department's treatment of sewage. The case was assigned to Judge Feikens. A consent judgment was entered into in September of 1977, but compliance with the judgment was unsatisfactory. By March of 1979 the department had been placed under federal court supervision, and Judge Feikens made Mayor Coleman Young the "administrator" of the department. The order of appoint-

ment gave Mayor Young extraordinary powers, including the power to bypass the Detroit City Council in awarding contracts and the power to award contracts without competitive bidding. Mayor Young informed the city council that notwithstanding these powers he would not bypass the council on contractual matters unless an emergency arose.

In July of 1979, approximately four months after the commencement of the administratorship, the department entered into a contract with Michigan Disposal, Inc., a company owned by one Michael Ferrantino, to dispose of sludge from the department's wastewater treatment plant. The award of this contract was authorized by the city council.

In January of 1980 Mayor Young appointed defendant Beckham to the position of director of the wastewater treatment plant. Sometime in the first few months of the same year defendant Bowers, a Detroit realtor and close friend of Mayor Young, invited a Mr. Jerry Owens, a clothing retailer from Mississippi, to come to Detroit and enter the sludge disposal business with herself and two white men, Sam Cusenza and Joseph Valentini. The latter two were associated with Mr. Ferrantino in the ownership of a company called Wolverine Disposal Company. By using Mr. Owens, who is black, as a front man, the other participants contemplated that they would be able to obtain city business on a preferential basis as "minority contractors." (Although defendant Bowers is also black, her relationship with Mayor Young was apparently such as to make it imprudent for Ms. Bowers herself to fill the role envisioned for Owens.)

Pursuant to this plan, a corporate entity called "Vista Disposal" was ostensibly organized with Owens as President and nominal owner of 100% of the stock. Fifty percent of the profits of the enterprise were initially supposed to go to Cusenza and Valentini, according to the government's proofs, and 50% to Bowers and Owens. Cusenza and Valentini were to provide any necessary start-up money.

In the spring and summer of 1980 Vista submitted to the city a number of proposals for a contract under which Vista would become the city's second sludge hauler. According to the government, these proposals were "riddled with false information"; they did not reveal the true owners of Vista, they falsely claimed that Vista was incorporated and had offices in downtown Detroit, and they gave false information concerning the qualifications of Mr. Owens. One thing that Vista actually did have to recommend it, however, was access to a landfill (controlled by Wolverine) where the sludge could be dumped around the clock, seven days per week.

On August 8, 1980, Mr. Beckham notified Vista that it had been selected to present a formal proposal to the city. Four days later Owens, Cusenza and Valentini met with Mr. Beckham and city employee David Fisher. Mr. Owens testified that Fisher asked for the resumes of all principals of Vista, and that Owens submitted only his own resume, neglecting to inform Fisher of the interests of Ms. Bowers and the other silent partners. Mr. Fisher apparently was given to understand that Cusenza and Valentini were attending the meeting in their capacity as owners of Wolverine; Owens testified that he expressed a desire at the meeting to include Wolverine in the contract as part of a joint venture. (Mr. Fisher responded that this was impermissible; since the bid had been submitted in Vista's name, he explained, the contract would have to be made with Vista alone. Mr. Fisher did say that Vista might be able to use Wolverine as a subcontractor, however.)

In September of 1980 a city attorney named Denise Page Hood began to negotiate the terms of a contract with Vista. Ms. Hood testified that Owens told her that he was the sole owner of Vista. Ms. Hood was also misled, it appears, on the subject of Vista's ability to procure a performance bond. Even though Vista attorney Charles Carson had been told that Vista could not obtain the required $250,000 bond, Mr. Carson first told Ms. Hood that Vista was in the process of

obtaining a bond, and later told her that an insurance agency was qualifying Vista for a bond and would issue it within two weeks. Mr. Carson went so far as to procure and present to Hood a letter from an insurance agency that falsely stated such was the case.

Wolverine and Vista subsequently entered into a joint venture relationship, in violation of the city's requirements, and Cusenza, Valentini and Wolverine borrowed $250,000 to be used as an escrow deposit in lieu of the bond. In addition, Wolverine advanced Vista $350,000 for initial operating capital.

There was a delay in awarding the contract, and Ms. Bowers became concerned about the award. Mr. Owens testified that Ms. Bowers told him that she would contact Mr. Beckham and an aide to Mayor Young and do "everything in her power" to speed things up. During a period when the proposed Vista contract was before the city council for approval, Mr. Beckham appeared before the council several times to testify in connection with the award. According to Detroit City Councilman William Rogell, because Mr. Beckham on several occasions "wouldn't answer" questions about Vista, the councilman presented Beckham with a list of fourteen written questions regarding Vista's qualifications. A delay in answering these questions caused further consideration of the contract to be postponed until October 22, 1980. On October 20, however, the Mayor's Office summarily awarded the contract to Vista, using the extraordinary powers granted by the district court. The stated reason was that further delay created a risk that the treatment plant would exceed its sludge storage capacity, thus causing a violation of the district court consent judgment.

According to Mr. Owens' testimony, Owens, Ferrantino, Cusenza, Valentini and Bowers thereafter met at the Vista office. According to the government's appellate brief, "Ferrantino said that Beckham had done a 'good job in helping them get things put together and that Beckham should

be taken care of.' Bowers then suggested they give Beckham $1000 monthly from Vista-Wolverine and $1000 monthly from Michigan Disposal. Everyone consented." Mr. Owens testified that in November of 1980 Ms. Bowers told him she had paid Beckham his first $2,000.

Mr. Owens had previously been in trouble with federal authorities in Mississippi, and had entered into a plea agreement under which he agreed to cooperate with the government. This led to his being approached by F.B.I. agents in Detroit about cooperating in an F.B.I. investigation of the Vista situation. Owens agreed.

On December 5, 1980, Owens was fitted with a microphone and recorded a meeting with attorney Carson, Messrs. Cusenza, Valentini and Ferrantino, and Ms. Bowers. In the course of that meeting the participants agreed to deposit all monies from the Vista contract into a bank account controlled by the Vista/Wolverine joint venture, with 40% of the profits ultimately going to Wolverine, 40% to Bowers, and 20% to Owens.

Owens testified at trial that Ms. Bowers told him at a time close to January 1, 1981, that she had given defendant Beckham two more payments of $2000 each. Because Owens had not yet mastered the intricacies of his electronic companion, he failed to get a recording of this statement. On January 20, 1981, Owens tried to get a similar admission on tape. This time he succeeded; the tape captured the voice of Ms. Bowers explaining to an inquisitive Owens that she had given Beckham a total of $6000 so far.

On January 27, 1981, Owens recorded a telephone conversation and a subsequent meeting at which Mr. Beckham took a coat from Owens without paying for it. "[A] 40 regular is perfect for me," Beckham said as he admired the garment. Moments later, Beckham explained to Owens how "Mike" (Ferrantino) "took care" of "township folks" so that they would not complain about the presence of his landfill.

On February 23, 1981, Owens recorded a conversation with Ferrantino, Cusenza, Valentini and Bowers in which Ms. Bowers argued at some length that her share ought to be increased to 50%. Owens testified that in an unrecorded conversation in February, Valentini told him that he owed Ferrantino the $4000 that Valentini had used as his contribution toward bribing Beckham. On March 24, 1981, Owens recorded a conversation in which Bowers and Owens discussed renting an apartment for Beckham. Bowers said that she would subtract the rent from Beckham's "two" before she gave it to him.

Until this point all of the evidence was collected without the involvement of Judge Feikens or any other judge. By the end of March, 1981, however, the United States thought it had obtained enough evidence to justify a wiretap on Ms. Bowers' telephone—something that would require judicial approval under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520. An affidavit of the United States Attorney, Richard Rossman, states that because of Judge Feikens' involvement in the operation of the Detroit Water and Sewerage Department, he and the Chief of the Detroit Strike Force Stanley Marcus informed Judge Feikens of the investigation and their plan to request authorization for electronic surveillance. Rossman's affidavit further states that he and Marcus asked Judge Feikens at this time whether the matter of getting a warrant for the wiretaps should be handled by Judge Feikens or the "miscellaneous judge." Rossman stated that he and Marcus were subsequently told by Judge Feikens that he had discussed the matter with the miscellaneous judge (the late Judge Thomas Thornton), and that the two had agreed that Judge Feikens should "review any application to conduct electronic surveillance."

The U.S. Attorney's office then gave Judge Feikens a 101-page affidavit in which F.B.I. Special Agent Virgil Woolley set forth the evidence accumulated so far. Included in the

affidavit were excerpts from the consensually recorded conversations, as well as the text of a written statement given the F.B.I. by Jerry Owens and a summary of a later interview of Owens by Agent Woolley. Judge Feikens authorized the first wiretap (on Ms. Bowers' telephone) on March 31, 1981. He authorized further wiretaps on eight subsequent dates ending with September 2, 1981.

Evidence supporting findings of probable cause for the later applications continued to mount. During April and May of 1981 there were several recorded conversations in which Bowers and Valentini discussed payments to Beckham. On May 7, for example, Ms. Bowers told Owens that she had paid Beckham $4000 for the months of April and May and that she did not like the fact that Cusenza and Valentini knew about the payoffs. In a conversation recorded at Vista's office on June 2, 1981, Owens told Bowers that he had some clothing for Beckham and also that he had won $2,300 in a golf game; Owens offered $2000 of his winnings for paying Beckham. In what the government describes as a consensual recording and videotape at the Vista office later that day, Beckham tried on the clothing. Once again, the 40 regular was a perfect fit. Beckham discussed his new apartment (financed with the monthly payoff) with Owens. As the government portrays the ensuing events:

> "Bowers picked up the envelope containing $2,000 from Owens' desk and left the office. A few minutes later, Bowers reentered the office, walked over to Owens' desk and dropped the envelope in her handbag. As Owens momentarily turned his back to Beckham and Bowers while he was putting Beckham's clothing into a garment bag, Bowers reached into her handbag, brought out an envelope, and threw it to Beckham, saying 'Catch.' The envelope hit the floor in front of Beckham's seat. Beckham laughed, picked up the envelope and placed it in his inside coat pocket."

On August 4, Ferrantino and Bowers discussed the money ("the envelope") and a breakfast meeting scheduled for the next day with Beckham. FBI agents observed that meeting, which took place at a local restaurant. At the end of the meeting the agents observed Bowers handing Beckham a white envelope.

On January 8, 1982, Mr. Beckham was questioned by the FBI about Vista. He later admitted that he lied to the agents during this session.

On February 3, 1983, a federal grand jury handed up indictments charging Beckham, Bowers, Ferrantino, Valentini, and Cusenza with substantive and conspiratorial R.I.C.O. violations (18 U.S.C. § 1362(c) and (d)) and mail fraud (18 U.S.C. § 1341). In addition, Beckham was charged with violating the Hobbs Act (18 U.S.C. § 1951), and Carson was charged with mail fraud. The cases went to trial in due course, but the jury was unable to agree on a verdict and the court declared a mistrial. Valentini subsequently pleaded guilty to a R.I.C.O. conspiracy charge, Cusenza pleaded guilty to a substantive R.I.C.O. charge, and Carson pleaded guilty to misprision of a felony. Ferrantino died before he could be retried. Defendants Beckham and Bowers were retried, and the second jury found them guilty on all counts with which they were charged.

The defendants claim that Judge Feikens lacked the neutrality and detachment necessary for proper authorization of the electronic surveillance because (1) he was so deeply involved in the treatment plant receivership that he could not deal with the criminal investigation in a clearheaded manner; (2) he had a personal dislike for the defendants; and (3) he had evidenced prejudice against persons of the defendants' race. (The only question presented is whether Judge Feikens was disqualified from authorizing the electronic surveillance; the trial itself was conducted not by Judge Feikens, but by Judge Robert DeMascio.) Judge DeMascio denied the

defendants' motions for suppression of the electronic surveillance evidence, and we believe that he was correct in so doing.

* * *

Statutory law and the Fourth Amendment both require that a proper warrant be issued before federal authorities engage in non-consensual wiretaps. See *Alderman v. United States,* 394 U.S. 165, 175-80 (1969). "An application for a wiretap is similar in purpose to an application for a search warrant, *i.e.,* to present sufficient information to enable a detached and neutral judicial officer to find that probable cause exists to issue the order or warrant." *United States v. Garcia,* 785 F.2d 214, 222 (8th Cir.), *cert. denied sub nom. Barker v. United States,* 90 L.Ed.2d 342 (1986). That the judicial officer be "neutral and detached" is essential, for judicial impartiality is basic to fair treatment under our system of jurisprudence. See *Chapman v. California,* 386 U.S. 18, 23 & n.8 (1967).

The cases addressing the "neutral and detached" requirement fall into two primary categories. The archtype of the first is *Tumey v. Ohio,* 273 U.S. 510, 523 (1927), where the Supreme Court found that the Due Process Clause of the Fourteenth Amendment would be violated by subjecting a person's liberty or property "to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case." (*Tumey* involved a mayor who received fees from alleged lawbreakers brought into a mayor's court.) See also *Ward v. Village of Monroeville,* 409 U.S. 57 (1972) (a mayor ought not act as a traffic court judge where he was responsible for raising revenue for the town and the fees collected in traffic court were a major source of town revenue); *Connally v. Georgia,* 429 U.S. 245, 250 (1977) (paying justices of the peace $5 every time they issued a warrant, while paying nothing when a warrant application was denied, offered " 'a possible temptation to the average man as a judge. . . or which might lead him not to hold the balance nice, clear and true between the

State and the accused' " (quoting *Ward*, 409 U.S. at 60)); *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. __, 89 L.Ed.2d 823 (1986) (state supreme court justice ought not participate in a case if the decision might set a precedent that would improve the justice's legal prospects in lawsuits he filed as a private citizen).

Judge Feikens had no pecuniary interest of the kind dealt with in *Tumey* and its progeny. It is true that Judge Feikens' was the court supervising the operation of the wastewater treatment plant, but the judge had no personal financial interest in that operation. In issuing authorizations for electronic surveillance, Judge Feikens was not trying to raise money for his court or for the receivership; he was simply responding to the legitimate requests of law enforcement officials who presented him with overwhelming evidence of wrongdoing.

The second line of "neutral and detached" cases stems from the reasoning of *Johnson v. United States*, 333 U.S. 10, 13-14 (1948), where the Court explained the policy inherent in the warrant requirement thus:

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime."

See also *Coolidge v. New Hampshire*, 403 U.S. 443 (a state attorney general who was personally in charge of investigating a widely publicized murder, and who later acted as chief prosecutor at trial, ought not to have issued a search warrant in the case); *Shadwick v. City of Tampa*, 407 U.S 345, 350 (1972) ("Whatever else neutrality and detachment might entail, it is clear that they require severance and disengage-

ment from activities of law enforcement."); *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 326 (1979) (town justice who accompanied the investigating officers to the scene of the crime to help in enforcing his open-ended warrant did not "manifest that neutrality and detachment demanded of a judicial officer when presented with a warrant application for a search and seizure").

One thing that is striking about those cases is the closeness of the judicial/prosecutorial links. In *Coolidge*, the prosecutor himself issued the warrant. In *Lo-Ji*, the judge gave the police a blank check and then went to help them seize the evidence. In the case at bar, by way of contrast, Judge Feikens had no such links to the prosecution, and he did what any neutral and detached judicial officer would have done if presented with evidence of the type before him; he found that there was probable cause and issued the Title III authorizations for electronic surveillance. His actions did not, in our judgment, bring him within the proscription of the "prosecutorial involvement" line of cases.

Appellants point to the extensive involvement of Judge Feikens with the water and sewerage department receivership, but, as Judge DeMascio has noted, the Title III authorizations antedated Judge Feikens' principal involvement in the affairs of the department. It is true that the receivership had commenced before March of 1981, but the record does not show that the judge had more than a handful of occasions even to think about the receivership after its establishment and before the wiretaps were authorized. On one occasion Judge Feikens appeared before the Detroit City Council to answer criticisms and complaints involving the receivership, but the council calendar reflects that the meeting was to take only fifteen minutes. There was also an incident in 1980 where an attorney named James Canham, who had filed a state court suit regarding a collapsed sewer, was told by another attorney that the case belonged in federal court. According to an offer of proof, Canham went to Judge

Feikens to discuss this and "specifically recollects Judge Feikens asking him why he brought the suit in Macomb County, when he, Judge Feikens, was the Receiver over the DWSD." About the only other pre-1981 evidence proffered by appellants was that of Joe Moore, the assistant administrator of the water and sewerage department. According to Moore's affidavit, sometime in 1979 or 1980 "Judge Feikens called me personally and asked me if I felt or knew of anything illegal going on at the wastewater treatment plant." Moore also had occasion to send Judge Feikens a letter in February of 1980 outlining the shift changes at the treatment plant; the letter apparently had something to do with union negotiations. The remaining—and much more extensive—evidence of Judge Feikens' involvement in departmental matters relates to events that took place after the Title III authorizations were issued.

The pre-wiretap authorization occurrences called to our attention by the defendants are insufficient to support a claim that Judge Feikens was biased. Not only were the actions and statements in question few and far between, but, more significantly, they all stemmed from the performance of Judge Feikens' judicial duties in the civil case. Such occurrences would not serve to disqualify him, because "a judge's alleged bias must emanate from some 'extrajudicial source' rather than from participation in judicial proceedings." *Demjanjuk v. Petrovsky*, 776 F.2d 571, 577 (6th Cir. 1985), *cert. denied*, 89 L.Ed.2d 312 (1986).

The defendants argue that certain language used by Judge Feikens demonstrated a deep personal identification with the the Detroit Water and Sewerage Department. The appellants went so far as to hire a linguistics professor who was prepared to testify that "it would be his expert opinion and conclusion that Judge Feikens connects and/or associates himself with the DWSD in a capacity other than that of the judge before whom the case is pending and that Judge Feikens speaks for the system and, based upon his language, Judge Feikens con-

siders himself and the DWSD one and the same." The professor arrived at this conclusion by looking to Judge Feikens' use of pronouns, to his failure to deny his "receivership role" when statements implying such a role were made by others, and to "a syntactically defined system of references" and "a contextually defined system of references." The government dismisses Judge Feikens' use of pronouns as nothing more than the "royal 'we,' " and denies that this shows that Judge Feikens' "identity had somehow merged with the DWSD." Whatever the merits of that debate — and without intending to suggest that there may not have been occasions following the wiretap authorizations when a somewhat more judicious and less regal use of language might have been appropriate on the judge's part—we are bound to say that we can find absolutely nothing in what Judge Feikens said before the wiretaps were authorized that could come anywhere close to justifying a reversal of the defendants' criminal convictions.

* * *

The claim that Judge Feikens harbored some sort of personal animosity toward the defendants is likewise unsubstantiated. In a *Detroit Free Press* interview published more than three years later, Judge Feikens did say that he thought that Mayor Young had been unwise to

> "choose a person like Darralyn Bowers. In a prior experience with her, she went out in Rosedale Park and tried block-busting, and there was a case in this court years before Vista in which Judge Keith presided. Darralyn Bowers was very much interested in getting these white people in Rosedale Park terror-stricken at the thought that blacks were moving in."

Judge Feikens went on to say that it was a shame that Bowers and Owens simply operated as a black front for whites associated with Ferrantino, thereby depriving blacks of an opportunity to receive the benefits of the jobs to be had and skills

to be learned in the sludge hauling business. In context, and given the amount of water that had gone over the dam between the time of the wiretap authorizations and the time of the interview, these statements have little probative value. They hardly demonstrate that Judge Feikens based his decision to authorize the wiretaps on anything other than the very strong evidence of serious wrongdoing presented by the U.S. Attorney.

Mr. Beckham makes much of the proffer of testimony by Assistant Administrator Moore. Moore would have testified that in the summer of 1981 he suggested that the position he held be combined with that held by Beckham. Judge Feikens' response was "Not that fellow Beckham." Moore, taken aback, did not respond. According to Moore, Judge Feikens then added, "You know these people have to be led."

What Mr. Beckham ignores is that this conversation took place at a time when Judge Feikens was seeing monthly reports on Mr. Beckham stuffing cash-filled envelopes into his pockets. That the judge was not enthusiastic about giving greater responsibility to a man he knew to be a crook hardly requires explanation, whatever one may think of the judge's notion that people like Mr. Beckham, who is black, "have to be led" — presumably by people who, like the judge, are not.

Our conclusion is in no way impaired by the holding in *Offutt v. United States*, 348 U.S. 11 (1954), where a "clash" between the trial judge and counsel for a criminal defendant "colored the course of the trial" and carried "increasing personal overtones." At the close of trial in *Offutt*, the judge summarily found defense counsel in criminal contempt under Fed.R.Civ.P. 42(a). The Supreme Court ordered that the criminal contempt charge be reheard by a different judge. The "vital point," according to the Court, was "that in sitting in judgment on such a misbehaving lawyer the judge should not himself give vent to personal spleen or respond to a personal grievance." *Id.* at 14.

Nothing in the record in the case at bar indicates the sort of personal animosity found in *Offutt*. Almost every alleged indication of hostility toward the appellants in this case came after the time the Title III authorizations were issued—by which time, as we have noted, Judge Feikens had learned of the appellants' criminal activity.

Finally, we must advert to certain additional statements made by Judge Feikens in the *Detroit Free Press* interview referred to above. Those statements, described in detail in our opinion in *In re City of Detroit, Detroit Water and Sewerage Department*, _ F.2d _ (6th Cir. 1987), lend themselves to the interpretation that the judge, although obviously sympathetic toward black people, tended to patronize them. Publication of the article led to the filing of several complaints with the Sixth Circuit Judicial Council, but the council declined to reprimand the judge for his remarks. Impolitic though the statements may have been, we can find in them no indication whatever that the Title III wiretap authorizations issued more than three years earlier were based on anything other than the strong showing of wrongdoing presented to the judge by the government prosecutors.

By March 31, 1981, there was ample evidence of probable cause. The consensually recorded conversations[1] and the statements of Jerry Owens showed that bribes were being passed; this evidence was more than enough to persuade any neutral and detached judicial officer that electronic surveillance was appropriate.[2] If someone other than Judge Feikens

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[1]"Neither the Constitution nor any Act of Congress requires that official approval be secured before conversations are overheard or recorded by Government agents with the consent of one of the conversants." *United States v. Caceres*, 440 U.S. 741, 744 (1979).

[2]This disposes of a minor argument of appellants, that a district court rule was violated when Judge Feikens handled the warrant applications instead of the "miscellaneous judge," the late Judge Thomas Thornton. This court has held that "[e]ven when there is an error in the process

had heard the Title III applications, the result would have been precisely the same.

The judgment of the district court is AFFIRMED.

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by which the trial judge is selected, or when the selection process is not operated in compliance with local rules, the defendant is not denied due process as a result of the error unless he can point to some resulting prejudice." *Sinito v. United States*, 750 F.2d 512, 515 (6th Cir. 1984). See also *United States v. Gallo*, 763 F.2d 1504, 1532 (6th Cir. 1985).

APPENDIX B

No. 84-1105/1193/1250/1736/1737

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plantiff-Appellee,

v.

DARRALYN C. BOWERS, ET AL.,

Defendants-Appellants

Filed

Dec. 1, 1987
John P. Hehman, Clerk

Order

BEFORE: NELSON and RYAN, Circuit Judges, and contie, Senior Circuit Judge

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk